GJ CONSULTANCY SDN BHD v. GAN TECK LIM

HIGH COURT MALAYA, KUALA LUMPUR
ATAN MUSTAFFA YUSSOF AHMAD JC
[CIVIL SUIT NO: WA-27NCC-97-10-2020]
31 MAY 2021

CIVIL PROCEDURE: *Striking out – Writ and statement of claim – Claim for amount due and owing based on fixture note arising from letter of guarantee and indemnity – Whether guarantee or indemnity – Whether claim subject to proof of breach in arbitration tribunal – Whether claim made prior to proof of breach amounted to abuse of court process – Contracts Act 1950, ss. 77, 79 & 86 – Rules of Court 2012, O. 18 r. 19(1)(b), (c) & (d)*

CIVIL PROCEDURE: *Stay of proceedings – Application for – Application for stay in favour of arbitration agreement – Claim for amount due and owing based on fixture note arising from letter of guarantee and indemnity – Whether guarantee or indemnity – Whether presence of arbitration clause in fixture note required matter be referred to arbitration tribunal – Whether claim subject to proof of breach by arbitration tribunal – Arbitration Act 2005, s. 10(1) & (4)*

In order to charter a vessel to ship sand river from Malaysia to China, Detik Timur Sdn Bhd ('Detik Timur') entered into a shipping arrangement with the plaintiff based on a fixture note. Initially, two laydays and cancelling dates for the purpose of loading Detik Timur's cargo ('laycan period') were fixed by the parties. However, due to Detik Timur's cancellation of the earlier two laycan periods, Detik Timur's executive chairman ('defendant') signed a personal guarantee and indemnity letter in favour of the plaintiff in respect of the fixture note for the purpose of fixing the third laycan period. The third laycan period was subsequently cancelled by Detik Timur. Pursuant to the cancellation, Detik Timur informed the plaintiff that it would accept all responsibilities, as set out in the fixture note, and requested the plaintiff to issue an invoice for payment. The plaintiff complied with the request, and an invoice for the sum of USD280,000, being the dead freight and demurrage charges imposed due to the non-performance of the fixture note was issued to Detik Timur. However, no payment was affected by Detik Timur. Instead, the plaintiff was informed that one Bryan Kung had been appointed to liaise with it for the purpose of settlement. The proposed payment terms, including the first payment of USD25,000 were forwarded to the plaintiff. Despite this, Detik Timur did not make the payment as it had proposed, and, an email was sent by Bryan Kung to the plaintiff which requested for the payment's postponement. Following that, no payment was forthcoming from the defendant at all. The plaintiff took the position that since the defendant had given his indemnity by way of the letter of indemnity and guarantee in favour of the plaintiff in respect of the fixture note, the defendant ought to be personally and equally liable to pay the plaintiff for all the amount due

and owing by Detik Timur to the plaintiff. The plaintiff then commenced legal proceedings against the defendant ('plaintiff's action'). Hence, the defendant's application to (i) strike out the plaintiff's writ and statement of claim pursuant to O. 18 r. 19(1)(b), (c) and/or (d) of the Rules of Court 2012; and (ii) stay the plaintiff's action and for the matter to be referred to arbitration, pursuant to s. 10(1) and/or s. 10(4) of the Arbitration Act 2005 ('defendant's application'). Supporting its application, the defendant, *inter alia*, contended that: (i) the letter of indemnity and guarantee was a guarantee and not an indemnity, hence, the plaintiff's action was subject to proof of the breach by Detik Timur which ought to be established first through proceedings against Detik Timur; (ii) the claim to prove the breach by Detik Timur and the plaintiff's action have to be heard together by way of arbitration since the fixture note and the letter of indemnity and guarantee must be harmoniously read and simultaneously applied together due to the presence of an arbitration clause in the fixture note; (iii) therefore, either both actions had to be heard together by way of arbitration or the plaintiff to first obtain an award against Detik Timur, before it be allowed to seek recovery from the defendant; and (iv) thus, the plaintiff's action was an abuse of court process.

Held (dismissing application with costs):

(1) The relevant clauses and preambles of the letter of guarantee and indemnity denoted that: (i) it was a contract to keep the plaintiff harmless against loss. The defendant had himself agreed to indemnify the plaintiff in respect of any loss or damage suffered by the plaintiff as the disponent owner of the vessel resulting from the non-performance of the charterer (Detik Timur); (ii) the defendant was putting himself in the position of Detik Timur, not merely as a guarantor to the demurrage charges imposed, but, as a person principally liable towards it; (iii) any variations to the terms and conditions of the fixture note would not discharge the defendant from its obligations to indemnify the plaintiff. This was contrary to the nature of a contract of guarantee as provided in s. 86 of the Contracts Act 1950; and (iv) the letter of guarantee and indemnity does refer to the fixture note. However, it was only a narrative as to what had happened prior to the letter being executed and an explanation to its context. It did not mean that the fixture note was interwoven with the letter of guarantee and indemnity. From these, it showed that the letter of guarantee and indemnity was an indemnity and not a guarantee. Being an indemnity, it could then be enforced separately and independently from the underlying liabilities and obligations of Detik Timur, dispensing the need for the plaintiff's action to be heard together or the requirement that Detik Timur ought to be sued by the plaintiff first. A stay of proceedings pending arbitration thus could not be granted on this basis. (paras 34-40 & 42)

(2) There was no merit in the defendant's submission that the plaintiff had abused the court's process by filing the plaintiff's action against the defendant instead of determining the liability of Detik Timur first in arbitration proceedings. The letter of guarantee and indemnity by its nature was an indemnity, therefore, the plaintiff had a valid claim against the defendant. Hence, the defendant's application was dismissed with costs. (paras 44 & 45)

Case(s) referred to:

Allied Granite Marble Industries Sdn Bhd v. Chin Foong Holdings Sdn Bhd & Ors [2000] 5 CLJ 71 HC ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Bangsue Chia Meng Rice Mill Co Ltd v. Rekadjaya Sdn Bhd & Anor [2014] 1 LNS 1251 HC ***(refd)***

Bank Bumiputra (M) Bhd v. Esah Abdul Ghani [1985] 2 CLJ 409; [1985] CLJ (Rep) 41 SC ***(refd)***

Bank Pembangunan Malaysia Bhd v. Spring Hill Bioventures Sdn Bhd [2020] 4 CLJ 15 CA ***(refd)***

China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal [1996] 3 CLJ 163 FC ***(refd)***

Elf Petroleum SE Asia Pte Ltd v. Winelf Petroleum Sdn Bhd [1984] 1 LNS 166 HC ***(refd)***

Jaya Sudhir Jayaram v. Nautical Supreme Sdn Bhd & Ors [2019] 7 CLJ 395 FC ***(refd)***

Lesco Development Corp Sdn Bhd v. Malaysia Building Society Bhd [1987] 2 CLJ 290; [1987] CLJ (Rep) 160 SC ***(refd)***

Malaysia Offshore Mobile Production (Labuan) Ltd v. PCPP Operating Company Sdn Bhd & Ors [2018] 1 LNS 2131 HC ***(refd)***

Press Metal Sarawak Sdn Bhd v. Etiqa Takaful Bhd [2016] 9 CLJ 1 FC ***(refd)***

Protasco Bhd v. Tey Por Yee & Another Appeal [2018] 5 CLJ 299 CA ***(refd)***

RMarine Engineering (M) Sdn Bhd v. Bank Islam Malaysia Bhd [2013] 1 LNS 318 CA ***(refd)***

Sivarasa Rasiah & Ors v. Che Hamzah Che Ismail & Ors [2012] 1 CLJ 75 CA ***(refd)***

South East Asia Insurance Bhd v. Nasir Ibrahim [1992] 4 CLJ 1801; [1992] 1 CLJ (Rep) 295 SC ***(refd)***

Tan Wei Hong & Ors v. Malaysia Airlines Bhd & Other Appeals [2018] 9 CLJ 425 FC ***(refd)***

Trade Indemnity Company, Limited Appellants v. Workington Harbour and Dock Board Respondents [1937] AC 1 ***(refd)***

Yeoman Credit Ltd v. Latter And Another [1961] 2 All ER 294 ***(refd)***

Legislation referred to:

Arbitration Act 2005, ss. 9, 10(1), (4)
Contracts Act 1950, ss. 77, 79, 86
Rules of Court 2012, O. 18 r. 19(1)(b), (c), (d)

For the plaintiff - Poon Choong Yiew & Teh Kiao Huoi; M/s James Liew & Kong
For the defendant - Harjinder Singh Sandhu; M/s Akberdin & Co

Reported by Syamim Ariffin

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JUDGMENT

Atan Mustaffa Yussof Ahmad JC:

[1] This judgment concerns an application by the defendant, Gan Teck Lim, against the plaintiff, GJ Consultancy Sdn Bhd for a stay of proceedings pending arbitration in Singapore (encl. 9) and the striking out of the plaintiff's writ and statement of claim. This arose from a dispute relating to an alleged breach by the defendant of an indemnity given by the defendant to the plaintiff under a letter of guarantee and indemnity dated 29 December 2019.

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[2] At the hearing of this application I dismissed encl. 9 with costs on 11 March 2021. This judgment contains the full grounds for my decision.

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Defendant's Application

[3] In this application, the defendant prayed for the following:

(i) the plaintiff's writ and statement of claim dated 19 November 2020 to be struck out pursuant to, *inter alia*, O. 18 r. 19 (1)(b), (c) and/or (d) of the Rules of Court 2012 ("ROC 2012"); or

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(ii) these proceedings to be stayed and this matter to be referred to arbitration pursuant to, *inter alia*, s. 10(1) and /or s. 10(4) Arbitration Act 2005.

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Background Facts

[4] On or about 4 December 2019, the plaintiff entered into a shipping arrangement with a company named Detik Timur Sdn Bhd ("Detik Timur") based on a fixture note dated 4 December 2019 ("the fixture note") for the purpose of chartering one merchant vessel, MV Antero, to transport a shipment of sand river ("the cargo") at the shipowner's option from Pekan Port, Pahang, Malaysia to Nansha Port, Guangzhou, China.

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[5] For the purpose of loading the cargo, the laydays and the cancelling date ("laycan") were fixed between 9 December 2019 and 15 December 2019 ("the first laycan"). Subsequently, when the first laycan was approaching at that time, Detik Timur informed the plaintiff that it was not able to meet its obligation for the first laycan during the period from 9 December 2019 to 15 December 2019. Detik Timur and the plaintiff agreed for the plaintiff to defer the laycan to the period between 14 December 2019 and 17 December 2019 ("the second laycan") with a new nominated vessel, MV Dubai Knight. Detik Timur did not proceed to load the cargo during the second laycan period and the fixture note was cancelled at Detik Timur's option.

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[6] Subsequently or about 17 December 2019 by way of an email exchange, at the request of Detik Timur, the plaintiff once again agreed to fix a third laycan for the period between 28 December 2019 and 31 December 2019 ("the third laycan"). The plaintiff and Detik Timur also

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mutually agreed that for the purpose of the third laycan, all other terms in the fixture note will remain the same and in the event there is any postponement or cancellation of the shipment by Detik Timur, the total deposit sum of USD154,000 shall be forfeited by the plaintiff and will not be refunded.

[7] To provide a vessel for Detik Timur's shipment, the plaintiff chartered the vessel MV Nozomi. By way of Detik Timur's letter dated 27 December 2019, the arrangement of the third laycan process was communicated by Detik Timur to the plaintiff. In relation to the third laycan process, the defendant who is the executive chairman of Detik Timur, signed a personal guarantee and indemnity letter dated 29 December 2019 ("the letter of indemnity and guarantee") in favour of the plaintiff in respect of the fixture note.

[8] The vessel MV Nozomi was ready at Pekan Port from 28 December 2019 to receive the cargo but the plaintiff was asked by Detik Timur to defer the loading pending clearance from the relevant authorities. As at 4 January 2020, no further instructions were given by Detik Timur to the plaintiff either to shift the vessel MV Nozomi or to start the cargo loading operation. On or about 9 January 2020, Detik Timur issued a letter of cancellation dated 8 January 2020 to cancel the fixture note. In the letter, Detik Timur informed the plaintiff that they will accept all responsibilities as per the fixture note and requested the plaintiff to issue an invoice to Detik Timur for payment.

[9] Pursuant to Detik Timur's cancellation, the plaintiff issued an Invoice No. GJ/DTSB/20/01 dated 9 January 2020 to Detik Timur for the sum of USD280,000 ("the invoice") being the dead freight and demurrage charges imposed on Detik Timur due to the non-performance of the fixture note by Detik Timur. Detik Timur did not make any payment to the plaintiff pursuant to the invoice.

[10] Subsequently, Detik Timur by way of a letter dated 10 January 2020, informed the plaintiff that they appointed a representative, one Bryan Kung, to liaise with the plaintiff pertaining to the settlement or payment with regard to the vessel MV Nozomi. In the letter of appointment, Detik Timur stated that it accepted its responsibilities under the fixture note and would like to settle the case amicably. Detik Timur then sent a letter dated 14 January 2020 to the plaintiff proposing its payment terms. On or about 17 January 2020, Bryan Kung wrote to the plaintiff informing that he was given the authority to communicate on behalf of Detik Timur and also attached the letter of appointment dated 10 January 2020 together with Detik Timur's letter dated 14 January 2020. After some negotiation with Detik Timur, on or about 21 January 2020, Detik Timur informed the plaintiff that they would make the first payment of USD25,000 by the end of January 2020 which was agreed to by the plaintiff.

[11] Detik Timur did not make good on its promise to make the payment of USD25,000 to the plaintiff but instead, Detik Timur through Bryan Kung sent an email on 30 January 2020 to the plaintiff to request for a postponement of the payment set for January 2020. Following that, the plaintiff sent numerous reminder emails to Detik Timur for an update on the payment status but did not receive any response.

[12] As the payment from Detik Timur was not forthcoming, the plaintiff took the position that as the defendant had given his indemnity by way of the letter of indemnity and guarantee in favour of the plaintiff in respect of the fixture note, the defendant shall be personally and equally liable to pay the plaintiff for all the amount due and owing by Detik Timur to the plaintiff and commenced legal proceedings against the defendant on 19 November 2020.

[13] The defendant then filed this application in encl. 9 to seek reliefs for an order for stay or striking out of this legal proceeding.

The Law On Striking Out Pleadings And Stay Of Proceedings Pending Arbitration

[14] The rules on striking out pleadings are provided in O. 18 r. 19(1) of the ROC 2012 and reproduced below for convenient reference:

> 19. Striking out pleadings and endorsements (O. 18 r. 19)
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> (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that:
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> (a) it discloses no reasonable cause of action or defence, as the case may be;
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> (b) it is scandalous, frivolous or vexatious;
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> (c) it may prejudice, embarrass or delay the fair trial of the action; or
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> (d) it is otherwise an abuse of the process of the Court,
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> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

[15] The Federal Court in *Tan Wei Hong & Ors v. Malaysia Airlines Bhd & Other Appeals* [2018] 9 CLJ 425 has succinctly laid out the test for striking out pleadings, referring to the *locus classicus Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7. Ramly Ali FCJ delivering the judgment of the court, stated as follows:

> The tests for striking out application under O. 18 r. 19 of the ROC, as adopted by the Supreme Court in *Bandar Builder* are, *inter alia*, as follows:

(a) it is only in plain and obvious cases that recourse should be had to the summary process under the rule;

(b) this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously unsustainable;

(c) it cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence;

(d) if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O. 33 r. 3 of the ROC; and

(e) the court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

[16] The Court of Appeal, in *Sivarasa Rasiah & Ors v. Che Hamzah Che Ismail & Ors* [2012] 1 CLJ 75 adopted the well-settled principle of striking out in the following passage:

> A striking out order should not be made summarily by the court if there is issue of law that requires lengthy argument and mature consideration. It should also not be made if there is issue of fact that is capable of resolution only after taking *viva voce* evidence during trial (see: *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 3 CLJ 305; [1997] 2 MLJ 565 (FC)).

[17] The stay of proceedings pending an arbitration is governed by s. 10 of the Arbitration Act 2005 which provides:

> 10. Arbitration agreement and substantive claim before court
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> (1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

[18] Two prerequisites to the operation of s. 10 are critical for the court's consideration where the applicant for a stay thereunder must first demonstrate:

(i) that there is the existence of an arbitration agreement between the parties; and

(ii) that it has not taken a step in the court proceedings.

[19] Section 10 found application more recently in the Federal Court case of *Press Metal Sarawak Sdn Bhd v. Etiqa Takaful Bhd* [2016] 9 CLJ 1; [2016] 5 MLJ 417. Ramly Ali FCJ in delivering the judgment outlined the

requirements of the application of s. 10 of the Arbitration Act 2005 and held that if nothing negates the arbitration clause, the court must order a stay of proceedings and refer the matter to arbitration:

> [38] The court must acknowledge the competency of an arbitral tribunal to decide on its own jurisdiction without interference. The intention of Parliament is clear. Reading ss. 8, 10 and 18 together would indicate that Parliament has given the arbitral tribunal much wider jurisdiction and powers; and such powers extend to cases where even its own jurisdiction or competence or the scope of its authority, or the existence or validity of the arbitration agreement or clause, is challenged. To comply with the requirements of s. 10(1) the court should restrict its enquiry only to the issue of whether there is in existence a binding arbitration agreement or clause between the parties and whether the arbitration agreement or clause is null and void, inoperative or incapable of being performed. If the court is satisfied that the arbitration agreement or clause does not fall into any of these exceptions, it must order a stay of proceedings and refer the matter to arbitration.

Defendant's Submissions

[20] It is submitted by the defendant that the letter of indemnity and guarantee is a guarantee and not an indemnity. Because of this, the defendant says that the claim against the defendant is subject to proof of the breach by Detik Timur which has to first be established through the proceedings against Detik Timur. In support of this argument, the defendant submitted and contended as follows:

(i) At para. 30 of the statement of claim, the plaintiff pleaded that Detik Timur had failed to perform its obligations under the fixture note and failed to fulfil its responsibilities to pay the dead freight and demurrage due to its non-performance and breach of the fixture note. Thus, the plaintiff's claim against the defendant is arising out of non-performance by Detik Timur.

(ii) The defendant relied on the case of *China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal* [1996] 3 CLJ 163 for the proposition that a guarantee can be called upon only when the party whose performance the guarantee was for breaches its duties. The defendant also relies on *RMarine Engineering (M) Sdn Bhd v. Bank Islam Malaysia Bhd* [2013] 1 LNS 318 which defined a guarantee as a binding promise of one person to be answerable for a present or future debt or obligation of another if that other defaults where a guarantee is a secondary obligation which is assumed by the surety or guarantor.

(iii) As the plaintiff in the statement of claim alleges that Detik Timur has failed to fulfil its responsibilities and breached the fixture note, the claim being brought against the defendant is that as a guarantor to the default by Detik Timur.

(iv) The action against defendant is incumbent on the breach by Detik Timur and the liability of Detik Timur cannot be assumed without proceedings being initiated against it.

[21] The defendant also advances the submission that the claim against Detik Timur and the defendant has to be heard together by way of arbitration in Singapore as the fixture note and the letter of indemnity and guarantee have to be harmoniously read and simultaneously applied together given that there is an arbitration clause in the fixture note, and the fixture note is what the letter of indemnity and guarantee is based on. In furtherance of this point the defendant submitted and contended as follows:

(i) A guarantee is a secondary contract and contingent on liability against the principal being established. The defendant relies on *Allied Granite Marble Industries Sdn Bhd v. Chin Foong Holdings Sdn Bhd & Ors* [2000] 5 CLJ 71 to support this argument.

(ii) The letter of indemnity and guarantee is incumbent on the fixture note based on the preambles of the letter of indemnity and guarantee itself:

> (A) The Disponent Owner had entered into a contract with the Charterer under the terms Fixture Note dated 4th December 2019, whereby the charterer is obtaining a bulk carrier and/or mother vessel to transport sand from Pekan, Pahang to Nansha Port, Guangzhou.
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> ...
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> (D) The Charterer have made various representations in the said Agreement and Fixture Note that he will secure the anchorage, appoint shipping agent and get all necessary documentation and/or approval for the vessel before its arrival and have been put on notice by the Disponent Owner in regards to the possible demurrage. (*sic*)

(iii) Although cl. 5 of the letter of indemnity and guarantee provides that the letter of indemnity and guarantee "shall be governed and construed in all respects in accordance with the laws of Malaysia", and to be submitted "to the jurisdiction of the courts of Malaysia", the subsistence and existence of the letter of indemnity and guarantee is subject to the subsistence and existence of the fixture note.

(iv) Clause 34 of the fixture note provides that all disputes are to be resolved by way of arbitration in Singapore and cl. 4 of the fixture note provides that the owner's nominated bank is OCBC Bank in Singapore.

(v) Pursuant to s. 10(1) of the Arbitration Act 2005 these proceedings must be stayed and the parties are to refer the matter to arbitration given that the matter here is the subject of an arbitration agreement. The defendant referred to *Press Metal Sarawak Sdn Bhd v. Etiqa Takaful Bhd (supra*) for the proposition that a stay is mandatory once the requirements of s. 10 are fulfilled.

[22] It is further argued by the defendant that as the plaintiff will be commencing dual proceedings arising out of the same set of facts in two different forums (the Malaysian Court and Arbitration in Singapore) there will be multiplicity of proceedings running the risk of having two conflicting decisions from two different legal forums arising out of the same set of facts and cause of action. The defendant further submitted and contended as follows:

(i) In the plaintiff's statement of claim it is stated that it would be filing an action against Detik Timur where it was pleaded at para. 31, "Since it is an express term under the said fixture note that all issues arising from the fixture note are subject to the arbitration proceedings in Singapore and as such, the plaintiff will submit a claim against Detik Timur by arbitration proceedings in Singapore". Thus, the plaintiff's claim herein is an act of forum shopping.

(ii) The principal claim against Detik Timur and the guarantee claim must be heard together as the facts giving rise to the guarantee in the letter of indemnity and guarantee emanate from and are intrinsically interwoven with the principal claim against Detik Timur under the fixture note and must be disposed of concurrently.

(iii) The defendant referred to *Lesco Development Corp Sdn Bhd v. Malaysia Building Society Bhd* [1987] 2 CLJ 290; [1987] CLJ (Rep) 160 (SC) for the proposition that it is undesirable for two different courts to try and determine the same issues arising between the same parties relating to the same subject matter.

[23] The defendant submitted that either both actions have to be heard together by way of arbitration in Singapore or the plaintiff has to obtain an award against Detik Timur first and then seek recovery from the defendant. Thus, it is an abuse of process by the plaintiff for commencing this action directly against the guarantor first. The defendant cited the case of *Malaysia Offshore Mobile Production (Labuan) Ltd v. PCPP Operating Company Sdn Bhd & Ors* [2018] 1 LNS 2131 for the proposition that any potential liability of a party that is dependant on the liability of another party cannot be determined by the court first.

Plaintiff's Submissions

[24] The plaintiff submitted that there is no arbitration agreement between the plaintiff and the defendant within the meaning of s. 9 and s. 10 of the Arbitration Act 2005, based on which a stay can be granted. In this regard the plaintiff submitted that:

(i) The plaintiff's cause of action is only for the enforcement of the letter of indemnity and guarantee against the defendant in his personal capacity which is subjected to the jurisdiction of the courts of Malaysia.

(ii) The only agreement entered into between the plaintiff and the defendant is the letter of indemnity and guarantee which contains an express clause (cl. 5) that provides that the parties submit to the jurisdiction of the courts of Malaysia in all matters.

(iii) Clause 34 of the fixture note relied on by the defendant and to which the defendant is a non-party is only binding between the plaintiff and Detik Timur and is irrelevant to these proceedings.

(iv) The plaintiff referred to the Federal Court case of *Jaya Sudhir Jayaram v. Nautical Supreme Sdn Bhd & Ors* [2019] 7 CLJ 395 and the Court of Appeal case of *Protasco Bhd v. Tey Por Yee & Another Appeal* [2018] 5 CLJ 299 for the proposition that a party that is not a party to the arbitration proceedings as defined in the Arbitration Act 2005 does not come within the ambit and scope of sub-s. 10(1) of the Act.

[25] It is the submission of the plaintiff that this is also not a proper case for this court to exercise inherent jurisdiction to grant a stay of proceedings pending arbitration against non-parties as Detik Timur had already admitted its responsibilities and liabilities to the plaintiff but on the other hand the plaintiff is now enforcing the letter of indemnity and guarantee against the defendant in the jurisdiction of this court. The plaintiff submitted further as follows:

(i) Detik Timur is fully aware and had admitted to its responsibilities and liabilities to the plaintiff as demonstrated in its letters dated 31 December 2019, 8 January 2020 and 10 January 2020 addressed to the plaintiff. Detik Timur had also submitted its proposal to the plaintiff for settlement together with a payment schedule in its letter dated 14 January 2020.

(ii) The only issue involved is a refusal to pay a settlement sum due and owing by Detik Timur to the plaintiff, thus, there is nothing left to be settled by arbitration. In this regard, the plaintiff referred to the case of *Elf Petroleum SE Asia Pte Ltd v. Winelf Petroleum Sdn Bhd* [1984] 1 LNS 166; [1986] 1 MLJ 177 for the proposition that there is nothing to be settled by arbitration in respect of a claim which had been admitted. The plaintiff further referred to the case of *Bangsue Chia Meng Rice Mill Co Ltd v. Rekadjaya Sdn Bhd & Anor* [2014] 1 LNS 1251 which held that once a settlement is reached, there is no longer any dispute which forms the basis for reference to arbitration under an arbitration agreement.

[26] The plaintiff canvasses the argument that the letter of indemnity and guarantee is in the form of an indemnity which can be enforced separately and independently from the underlying liabilities and obligations of Detik

Timur. Accordingly, there is no need for the plaintiff's claim against Detik Timur to be heard together and nor does it require the plaintiff to sue Detik Timur first. In relation to this, it was further submitted and contended by the plaintiff as follows:

(i) The defendant is obliged to indemnify the plaintiff in respect of any loss or damage suffered by the plaintiff as the disponent owner due to the negligence or non-performance of Detik Timur, the charterer, as expressed in cls. 1 and 2 of the letter of indemnity and guarantee:

> (1) In the event the vessel happens to collude or incur any damage during the loading the Charterer shall be held responsible and shall make necessary arrangements to remedy the situation or make payment for the damages incurred by the vessel. The Charterer hereby agrees to indemnify the Disponent Owner in respect of any loss or damage suffered by the Disponent Owner caused due to the negligence or non-performance of The Charterer.
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> (2) Charterer warrants he shall be personally liable for any penalty or demurrage imposed.

(There was some confusion with who the "charterer" being referred to in cls. 1, 2, 3 and 4 of the letter of indemnity and guarantee due to an error in drafting as admitted by the plaintiff which the defendant did not take issue with. This matter was called up for clarification and parties agreed that, save for the words "the charterer" appearing last in cl. 1 which referred to Detik Timur which is the actual charterer, the word "charterer" in the rest of cls. 1, 2, 3 and 4 of the letter of indemnity and guarantee referred to the defendant and not Detik Timur).

(ii) The letter of indemnity and guarantee is an indemnity within s. 77 of the Contracts Act 1950 which defines a contract of indemnity as a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person. It is not a guarantee as defined in s. 79 of the Contracts Act 1950. The plaintiff referred the court to the Supreme Court case of *South East Asia Insurance Bhd v. Nasir Ibrahim* [1992] 4 CLJ 1801; [1992] 1 CLJ (Rep) 295 which explained that in a contract of indemnity, the promisor undertakes an original and independent obligation to indemnify, as distinct from a contract of guarantee which is a collateral contract by which the promisor undertakes to answer for the default of another person who is to be primarily liable to the promisee. *Bank Pembangunan Malaysia Bhd v. Spring Hill Bioventures Sdn Bhd* [2020] 4 CLJ 15 (CA) was also referred to for the proposition that a contract of indemnity is to indemnify the other party against any loss.

(iii) A guarantor in a contract of guarantee is only liable if the principal had defaulted but in a contract of indemnity, the indemnifier will be liable regardless of whether the principal has defaulted or not.

(iv) A contract of guarantee in the form of indemnity can be enforced separately and independently and therefore, it is not necessary for the plaintiff to obtain a judgment and/or award against Detik Timur before the letter of indemnity and guarantee can be enforced against defendant. The plaintiff relies on the Supreme Court case of *Bank Bumiputra (M) Bhd v. Esah Abdul Ghani* [1985] 2 CLJ 409; [1985] CLJ (Rep) 41 as an authority for the principle that in the absence of an agreement, a creditor is not bound to sue the principal debtor before suing the surety.

[27] The plaintiff also submitted that as the defendant's obligations under the letter of indemnity and guarantee is not discharged when there is a variation of any terms and conditions of the fixture note, this points toward the letter of indemnity and guarantee being a contract of indemnity. This is provided for in the letter of indemnity and guarantee in cl. 3(II):

> 3. Charterer hereby confirm and agree that his liability under this Indemnity shall not in any way be prejudiced, impaired, discharged, diminished or affected by:
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> ...
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> II. the variation of any of the terms and conditions of the said SPA, Fixture Note;

[28] The plaintiff further submitted that this is unlike a contract of guarantee where any variance in the terms of the contract will discharge the surety as provided in s. 86 of the Contracts Act 1950.

Analysis And Findings Of The Court

[29] The crucial issue for the court to consider in this application is whether the letter of indemnity and guarantee is in the nature of an indemnity or guarantee. The nature of an indemnity was explained by Holroyd Pearce LJ in the English case of *Yeoman Credit Ltd v. Latter And Another* [1961] 2 All ER 294:

> An indemnity is a contract by one party to keep the other harmless against loss, but a contract of guarantee is a contract to answer for the debt, default or miscarriage of another who is to be primarily liable to the promisee.

[30] The same position is true as provided under s. 77 of the Malaysian Contracts Act 1950:

> 77. A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a "contract of indemnity".

ILLUSTRATION

A contracts to indemnity B against the consequences of any proceedings which C may take against B in respect of a certain sum of RM200. This is a contract of indemnity.

[31] This is to be contrasted with a contract of guarantee which is defined in s. 79 of the Contracts Act 1950:

> 79. A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety"; the person in respect of which default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor". A guarantee may be either oral or written.

[32] In the Supreme Court case in *South East Asia Insurance Bhd v. Nasir Ibrahim* [1992] 4 CLJ 1801; [1992] 1 CLJ (Rep) 295, Gunn Chit Tuan SCJ explained the difference between a contract of indemnity and a contract of guarantee as follows:

> We found in the first place that the difference between a contract of indemnity and a contract of guarantee appears to have been overlooked. A contract of indemnity is defined in s. 77 of our Contracts Act 1950, as "a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person." A contract of guarantee, according to s. 79 of the Contracts Act 1950:
>
> > is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety"; the person in respect of which default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor".
>
> In a contract of indemnity, the promisor undertakes an original and independent obligation to indemnify, as distinct from a contract of guarantee which is a collateral contract by which the promisor undertakes to answer for the default of another person who is to be primarily liable to the promisee (*Yeoman Credit Ltd v. Latter* [1961] 1 WLR 828 - 831).

[33] The issue was again dealt with more recently by the Court of Appeal in *Bank Pembangunan Malaysia Bhd v. Spring Hill Bioventures Sdn Bhd* [2020] 4 CLJ 15. This is what Her Ladyship Suraya Othman JCA had to say on the nature of a contract of indemnity:

> [31] Under s. 77, a "contract of indemnity" is a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person. A contract of indemnity is therefore, according to a string of authorities, to be nothing more than "a contract by one party to keep the other harmless against loss" (*Yeoman Credit Ltd v. Latter* [1961] 1 WLR 828 at pp. 830 to 831; *Total Oil Products (Australia) Pty Ltd v. Robinson* [1970] 1 NSWR 701 and 703; and *Davys v. Buswell* [1913] 2 KB 47 at pp. 53 to 55). It is a contract

to indemnify the other party against any loss. And that the obligation has no reference in law to the debt of another (see *Clipper Maritime Ltd v. Shirlstar Container Transport Ltd (The Anemone)* [1987] 1 Lloyd's Rep 546 at p. 555; and *Harburg India Rubber Comb Co v. Martin* [1902] 1 KB 778 at p. 784).

[32] Under a contract of guarantee, there must be three parties involved: the surety, principal debtor/borrower and the creditor. A contract of guarantee is therefore an undertaking to guarantee the obligations of a named principal. In this regard, a contract of guarantee is essentially a collateral contract by which a guarantor/surety undertakes to answer for the default of the principal debtor/borrower who is to be primarily liable to the creditor. The guarantor therefore only owes a secondary obligation to the creditor to make good the particular defaults of the principal debtor. (see the cases of *South East Asia Insurance Bhd v. Nasir Ibrahim* [1992] 4 CLJ 1801; [1992] 1 CLJ (Rep) 295; [1992] 2 MLJ 355 and *Yeoman Credit Ltd v. Latter & Anor* [1961] 2 All ER 294).

[33] In the book *Banking Law*, 4th edn, LexisNexis by Lee Mei Pheng, Detta Samen and Ivan Jeron Detta, the authors at p. 873, citing the cases of *Sia Siew Hong & Ors v. Lim Gim Chian & Anor* [1996] 3 CLJ 26 and *The Pacific Bank Bhd v. Vimla Textiles & Ors* [2004] 6 CLJ 406 stated as follows:

> The main difference between a guarantee and an indemnity is that in the case of a guarantee, there must be three parties involved whereas in the case of an indemnity, two parties may be sufficient. In the construction of a document – whether it is a guarantee or an indemnity - the court is not bound by the label affixed onto that particular document. The duty of the court is to construe the document as a whole and to determine from its language and any other admissible evidence its true nature and purport.

[34] Applying the above authorities, where the liability of an indemnifier under a contract of indemnity is a primary liability, if the letter of indemnity and guarantee is an indemnity, it can be enforced separately and independently from the underlying liabilities and obligations of Detik Timur. This then dispenses with the need for the plaintiff's claim against Detik Timur to be heard together nor is it required for the plaintiff to sue Detik Timur first. A stay of proceedings pending arbitration cannot thus be granted on this basis.

[35] From an examination of the letter of indemnity and guarantee, the court finds that the defendant will be liable regardless of whether the principal (Detik Timur) is found liable for its default of the fixture note or not and thus the letter of guarantee and indemnity can be enforced separately and independently. I provide my reasons below.

[36] Clause 1 of the letter of guarantee and indemnity states that "the charterer (defendant) hereby agrees to indemnify the disponent owner in respect of any loss or damage suffered by the disponent owner caused due to the negligence or non-performance of the charterer (Detik Timur)". The

words here clearly denote that the defendant had himself agreed to indemnify the plaintiff in respect of any loss or damage suffered by the plaintiff as the disponent owner of the vessel due to the non-performance of the charterer (Detik Timur). In this sense the guarantee and indemnity is a contract to keep the plaintiff harmless against loss.

[37] The earlier words appearing in cl. 1 "In the event the vessel happens to collude (*sic*) or incur any damage during the loading the charterer (defendant) shall be held responsible and shall make necessary arrangements to remedy the situation or make payment for the damages incurred by the vessel" denote that as soon as collision happens the defendant must step in to remedy the situation, thus keeping the plaintiff harmless against the effect of the collision. Again, the defendant is obliged to keep the plaintiff harmless against loss.

[38] Clause 2 of the letter of guarantee and indemnity is immediately applicable for our purpose as this deals with demurrage which was invoiced by the plaintiff to Detik Timur, the subject matter of the plaintiff's claim. Clause 2 provides that the charterer (defendant) warrants he shall be personally liable for any penalty or demurrage imposed. Again, the words "he shall be personally liable for any ... demurrage imposed" denote that the defendant is putting himself in the position of Detik Timur, as being a person principally liable for the demurrage charges not merely as a guarantor. The liability of the defendant arises as soon as the event that is provided for in cl. 2 occurs, which is the imposition of the demurrage charges.

[39] Next, cl. 3(II) of the letter of indemnity and guarantee provides:

> 3. Charterer (defendant) hereby confirm and agree that his liability under this indemnity shall not in any way be prejudiced, impaired, discharged, diminished or affected by:
>
> ...
>
> II. the variation of any of the terms and conditions of the said SPA, Fixture Note;

[40] The effect of this is that in the event there is any variation of any terms and conditions of the fixture note, this will not discharge the defendant's obligations to indemnify the plaintiff. This would be contrary to the nature of a contract of guarantee where any variance in the terms of contract will discharge the guarantor as provided in s. 86 of the Contracts Act 1950 which states:

> 86. Discharge of surety by variance in terms of contract
>
> Any variance, made without the surety's consent, in terms of the contract between the principal debtor and the creditor, discharges the surety as to the transactions subsequent to the variance.

[41] The House of Lords in the English case of *Trade Indemnity Company, Limited Appellants v. Workington Harbour and Dock Board Respondents* [1937] AC 1 held that express provisions to preclude the release of the surety upon a variation of the contract or forbearance as to time indicated that the parties were thinking of the law as to guarantees. Lord Russell Of Killowen held as follows:

> On the other hand the contract demanded by the Dock Board was a guarantee; the defendants in the contract style themselves sureties; the contract appears in substance to be a contract to answer for the debt, default or miscarriage of another; and the express provisions negativing release of the "surety" upon a variation of the contract or forbearance as to time indicate that the parties were thinking of the law as to guarantees. I entertain no doubt that this was a guarantee, and the rights of the parties should be regulated on that footing.

[42] Preambles A and D to the letter of indemnity and guarantee do refer to the fixture note. However, this is only a narrative of what had happened prior to the letter of guarantee and indemnity being executed which explains its context. It does not mean the letter of guarantee and indemnity is interwoven with the fixture note. The succeeding paragraphs of the letter of guarantee and indemnity, as I have discussed, show that it is an indemnity. The argument that the letter of indemnity and guarantee is interwoven with the fixture note is only relevant if it is a guarantee when the liability of Detik Timur to the plaintiff will need to be first determined but here it is an indemnity.

[43] Having found that the letter of indemnity and guarantee is an indemnity, the action against the defendant should not be stayed and be referred to arbitration as the liability of Detik Timur need not be determined first.

[44] The defendant also prayed for the plaintiff's writ and statement of claim to be struck out pursuant to O. 18 r. 19(1)(b), (c) and/or (d) of the ROC 2012. The only submissions put forward by the defendant in this respect is that the plaintiff has abused the process by filing this action against the defendant instead of determining the liability of Detik Timur first in arbitration proceedings in Singapore and has "put the cart before the horse". There is no merit to this submission as I have found that the plaintiff has a valid claim against the defendant under the letter of indemnity and guarantee as it is by nature a contract of indemnity.

Conclusion

[45] In the result, I dismissed the defendant's application for stay of proceedings pending arbitration in Singapore and to strike out the plaintiff's writ and statement of claim. I also ordered costs for the plaintiff of RM3,000 for this application.